

EXHIBIT 1 TO
STATEMENT OF FACTS

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SEXY HAIR CONCEPTS LLC,)
)
 Opposer,)) **COPY**
)
 vs.)) Opposition No. 125, 739
) (SO SEXY)
 V SECRET CATALOGUE, INC.,)
)
 Applicant.)
)

DEPOSITION OF MARK STILLER

Chatsworth, California

Tuesday, September 28, 2004

Reported by:

MEGAN M. GROSSMAN

CSR No. 12586

Philadelphia Job No. 152101

Los Angeles Job No. 903365

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Deposition of Mark Stiller, taken
on behalf of Opposition, at 9232 Eton Avenue,
Chatsworth, California, beginning at 10:01 a.m.
and ending at 3:46 p.m. on Tuesday, September 28,
2004, before MEGAN M. GROSSMAN, Certified
Shorthand Reporter No. 12586.

1 **APPEARANCES :**2 **For Opposition:**3 **BALLARD SPAHR ANDREWS & INGERSOLL, LLP**4 **By: Roberta Jacobs-Meadway, Esq.**5 **1735 Market Street**6 **51st Floor**7 **Philadelphia, PA 19103-7599**8 **(215) 864-8201**9 **For Defendant:**10 **COLUCCI & UMANS**11 **By: Frank J. Colucci, Esq.**12 **101 East 52nd Street**13 **New York, NY 10022**14 **(212) 935-5700**15 **Also Present:**16 **Donna Federici (Joined proceedings at 1:42 p.m.)**

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WITNESS: MARK STILLER

1 BY MS. JACOBS-MEADWAY:

2 Q To whom did Ecoly International sell the hair
3 care products?

4 A We sell to distributors in the professional hair
5 industry.

6 Q What do you mean by the professional hair
7 industry?

8 A They are distributors who sell into salons.

9 Q Did Ecoly International do any advertising?

10 A Yes.

11 Q What type of advertising did Ecoly International
12 do for the Sexy Hair brands?

13 A We do a number of trade makers' union
14 advertising. I believe there was some consumer
15 advertising. Donna Federici will speak better as to
16 that, but definitely a lot of trade advertising.

17 We also do co-op advertising with all of our
18 distributors where they will advertise in their local
19 newspapers or through their internally-produced
20 newspapers that go out to all of the salons.

21 And we would reimburse or contribute a certain
22 amount towards that advertising.

23 Q When was the Sexy Hair brand first developed?

24 A In 1998.

25 Q And who was involved in the development of that

1 A I would have to estimate that at the moment. It
2 would be approximately 90 percent.

3 Q Has that percentage changed over the years?

4 A Yes. It has increased every year.

5 Q Now, you testified that there was a point in
6 time when Ecoly International ceased to be the operating
7 company and became a holding company. Is that correct?

8 A Correct.

9 Q When did that occur?

10 A January 2002.

11 Q Can you describe for me the change in the
12 business director of the company at that time?

13 A Yeah. We formed a -- we had been trading -- the
14 company was Ecoly International, Inc., but we had a dba
15 of Sexy Hair Concepts. So we were trading for the most
16 part under Sexy Hair Concepts.

17 We decided in January 2002 to actually have the
18 name of the company -- Sexy Hair had become so important
19 to us that we decided to change the name of the company.

20 We formed an LLC called Sexy Hair Concepts, LLC,
21 and transferred all the operations, assets, liabilities
22 into Sexy Hair Concepts, LLC.

23 Q Was there any change in the nature of the
24 business that was conducted as a result of the change in
25 the structure of the business?

1 A No. I just want to add there were also some tax
2 reasons why we formed the LLC.

3 Q In connection with the change in the structure
4 of the business, what steps were taken to implement the
5 change?

6 A Well, we -- can you clarify more when you say
7 what steps were taken? Are you talking about a legal
8 point of view?

9 Q No. You testified that the assets and
10 liabilities were all transferred from Ecoly International
11 into Sexy Hair Concepts, LLC.

12 A Correct.

13 Q Was there any change in connection with the
14 packaging of the product?

15 A In the earliest stages, the packaging had said
16 on the back of it that it was, I believe, manufactured or
17 distributed by Ecoly International Formulas by Ecoly.
18 That was changed to Sexy Hair Concepts.

19 Exactly when that change occurred, it might have
20 occurred before 2002 once we were using the dba from Sexy
21 Hair Concepts. I don't recall specifically when that was
22 done.

23 But we transferred all of our trademarks from
24 Ecoly International to Sexy Hair Concepts and, as I said,
25 all the operations moved into Sexy Hair Concepts. Ecoly

1 was left pretty much as a shell that just had the
2 interest in Sexy Hair.

3 Q In connection with the Sexy Hair brand, what is
4 the mark used other than the packaging?

5 A Well, it would be used on all of our promotional
6 pieces, our displays, our point of purchase. Clearly any
7 advertisements, when we do trade shows. That is how the
8 company is identified -- by the Sexy Hair.

9 So whenever you see the sign on our building,
10 whatever we do is under the name Sexy Hair.

11 Q How is the Sexy Hair brand promoted?

12 A There are various means we use. Again, Donna
13 Federici will be able to speak in more detail. But in
14 broader terms, we have a website. It's the Sexy Hair
15 website.

16 We attend numerous trade shows. We do a ton of
17 education. We run advertisements. We do monthly
18 promotions. We sponsor events, donate to charities.

19 We have our sales people out in the field who
20 are regularly meeting with our distributors. Our
21 distributors, salespeople, and walking into salons.

22 Q How many distributors does Sexy Hair Concepts
23 currently have?

24 A I would estimate that currently we have
25 approximately 40 and internationally approximately 27.

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1 Q Are these distributor organizations?

2 A Yes. Domestically, a distributor typically has
3 a state. Some might have more than one state and some
4 states we might have two distributors. But on average,
5 it's more or less one per state.

6 And internationally you have one distributor per
7 country. So if we have 27 distributors, we are in 27
8 countries, more or less.

9 Q What is the sales staff that Sexy Hair Concepts
10 has domestically?

11 A We have approximately 15 sales people scattered
12 around the country. Typically, each salesperson will
13 have on average two distributors that they take care of.

14 We also have a salesperson who is in charge of
15 national accounts which would be chains like Regis. That
16 type of chain. We have an international salesperson.
17 That is more or less of --

18 Q Who is in charge of the sales force?

19 A They are reporting to Donna Federici.

20 Q Are you involved in determining what types of
21 promotions are done by Sexy Hair Concepts?

22 A No, but I do approve them. In other words, once
23 marketing has decided on the promotions they want to do,
24 they bring it to me for assignments of proper operations,
25 gross margin, that type of thing.

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1 name escapes me right now.

2 Again, Donna can give you the complete list
3 because that's what she does.

4 Q In the course of these appearances, is there any
5 reference made to the Sexy Hair mark?

6 A Absolutely.

7 Q With respect to product placement, are you
8 familiar in connection with which television programs or
9 movies Sexy Hair brand products have been placed?

10 A Again, Donna can give you the list. I can give
11 you some that I recall, but if you want a more complete
12 list, Donna is the right person to ask that question.

13 Q Which are the ones that you recall?

14 A The Tonight Show with Jay Leno. Let me try and
15 get this right. "Queer Eye For the Straight Guy." I
16 believe it's something like that. There have been a few
17 other movies, but I can't recall the name right now.

18 Q Who is responsible at Sexy Hair Concepts for
19 having products placed on a program like "Queer Eye for
20 the Straight Guy"?

21 A Typically, that goes through our PR company,
22 M. Craig & Associates. Donna has an assistant who
23 handles PR internally.

24 Q What is the purpose of having a product placed
25 on a program like "Queer Eye for the Straight Guy"?

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1 more than one line of hair care product?

2 A Yes. They do typically.

3 Q You mentioned that there were chains of salons.

4 Do you know what percentage of the sales of Sexy Hair
5 brand products are sold through chains as opposed to
6 individual salons?

7 A I would estimate that for this year, the number
8 is probably 20, 25 percent. Between 20 and 30 percent I
9 would estimate for this year.

10 Q In chains?

11 A In chains. It might be closer to 20 percent.

12 Q What were the sales last year of the products
13 sold under the Sexy Hair brand?

14 A Sorry. Can you repeat that?

15 Q What were the sales last year of product under
16 the Sexy Hair brand?

17 A For 2003 I would estimate it would be in the
18 range of 29 million.

19 MR. COLUCCI: Objection.

20 BY MS. JACOBS-MEADWAY:

21 Q In 2002 what would you estimate the sales of the
22 Sexy Hair brand products to be?

23 A 2002 I would estimate around 23 million.

24 MR. COLUCCI: Same objection.

25 ///

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1 BY MS. JACOBS-MEADWAY:

2 Q What about 2001 sales of Sexy Hair brand
3 products?

4 A You are really testing me now.

5 Q Approximately.

6 A What year are we on?

7 Q 2001.

8 A I would be estimating 15 to 16 million.

9 Somewhere around there.

10 Q Mr. Stiller, I show you a document that has been
11 produced previously in the proceeding bearing Production
12 Numbers 2797 and 2798 and ask if you can identify that
13 for me.

14 A Sorry. Just to clarify the last question, you
15 were talking about our level of sales?

16 Q Yes, sir.

17 A Of Sexy Hair. Not at the consumer level?

18 Q Right.

19 A This looks like an income statement, or part of
20 an income statement, for ten months of 2003.

21 Q Are you familiar with income statements of that
22 sort?

23 A Yes.

24 Q To the best of your knowledge, are the net sales
25 figures shown on SHC 2797 and 2798 accurate to the best

1 of your recollection?

2 A They appear to be.

3 MR. COLUCCI: Objection.

4 BY MS. JACOBS-MEADWAY:

5 Q Now, Mr. Stiller, are you familiar with how
6 salons price the Sexy Hair brand products?

7 A Yes.

8 Q So in your experience, looking at the net sales
9 of approximately \$27 million where the ten months ended
10 October 2003, what would that translate to in retail?

11 MR. COLUCCI: Objection.

12 THE WITNESS: If I can just run through the
13 process. \$27 million worth of sales at our level
14 translates to about approximately \$50 million worth of
15 sales by the distributor to the salon which then
16 translates to \$100 million worth of sales at the salon
17 level.

18 Now, there is a certain percentage of the salon
19 product that is sold to salon that salon consumes as
20 opposed to retail. So if they retail all of it, it would
21 be around the \$100 million, but there is a percentage
22 that they consume which is clearly -- the smaller
23 percentage of what they buy.

24 MR. COLUCCI: Objection.

25 MS. JACOBS-MEADWAY: I would ask the reporter to

1 as a result of the opposition proceeding?

2 A Yes.

3 MS. JACOBS-MEADWAY: I would ask the reporter to
4 mark the documents pertaining to the Performance Brands'
5 application for "Sexy Bath and Body" as Opposer's
6 Exhibit 13.

7 (Opposer's Exhibit Number 13 was marked for
8 identification by the shorthand reporter.)

9 BY MS. JACOBS-MEADWAY:

10 Q I show you a set of documents pertaining to an
11 opposition to registration of "Sexy Thing" by Australian
12 Gold which bears the following Production Numbers, 2927
13 through 3025, and ask if you are familiar with the
14 opposition to registration of "Sexy Thing" by Australian
15 Gold.

16 A I do recall it.

17 Q I direct your attention to the page of the
18 document bearing Production Numbers SHC 3024 which is the
19 next to the last page.

20 Do you recall receiving a copy of that document
21 showing that the opposition was sustained by default to
22 registration of "Sexy Thing"?

23 A I do recall.

24 MS. JACOBS-MEADWAY: I would ask the reporter to
25 mark the documents relating to the Australian Gold

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1 opposition as Opposer's Exhibit 14.

2 (Opposer's Exhibit Number 14 was marked for
3 identification by the shorthand reporter.)

4 BY MS. JACOBS-MEADWAY:

5 Q I show you a document that has been previously
6 produced in the course of this proceeding bearing
7 Production Numbers SHC 3046 through 3057 and also
8 including 3037 through 3039 --

9 MR. COLUCCI: Excuse me. I have up to 3057. Is
10 there more to it?

11 MS. JACOBS-MEADWAY: They are internal
12 documents. If you flip through again, this is
13 chronological. You have then 3046 and 47, then 3048,
14 3037 --

15 MR. COLUCCI: I have 3045 --

16 MS. JACOBS-MEADWAY: 3037 through 3039.

17 MR. COLUCCI: I don't have that. I have to
18 3046.

19 MS. JACOBS-MEADWAY: 47 should be the second
20 one. 48 then 37? 3038, 3039, 3026.

21 MR. COLUCCI: Up to 36?

22 MS. JACOBS-MEADWAY: 3036 then 3043 to 3045.
23 3040 through 3042, 3049 through 3057.

24 MR. COLUCCI: Thank you.

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1 BY MS. JACOBS-MEADWAY:

2 Q Are you familiar with the potential opposition
3 for registration of "Sexy Soles in Sixty Seconds"?

4 A I am.

5 Q I would direct your attention to the page
6 designated SHC 3050 and 3051.

7 A Yes.

8 Q And ask if that is a copy of an agreement that
9 you signed on behalf of Sexy Hair Concepts?

10 A Yes, it is.

11 Q And is that agreement typical of agreements that
12 you have reached in connection with the efforts to
13 protect the Sexy Hair marks in connection with hair care
14 products?

15 MR. COLUCCI: Objection.

16 THE WITNESS: Yes.

17 MS. JACOBS-MEADWAY: I would ask the reporter to
18 mark the collection of documents relating to the
19 trademark application of Epiphany for "Sexy Soles in
20 Sixty Seconds" as Exhibit 15.

21 (Opposer's Exhibit Number 15 was marked for
22 identification by the shorthand reporter.)

23 BY MS. JACOBS-MEADWAY:

24 Q Are you aware, Mr. Stiller, of any applications
25 or registration of marks which contain the term "sexy"